Supreme Court, U.S.
FILED
MAY 30 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1676

In the Supreme Court of the United States

OCTOBER TERM, 1985

ELIZABETH S. McKEE AND DEBORAH GIBBS,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

Page

Cases:

Autenrieth v. *Cullen*, 418 F.2d 586, cert. denied, 397 U.S. 1036 4

Bill Johnson's Restaurants, Inc. v. *NLRB*, 461 U.S. 731 6

Collett v. *United States*, 781 F.2d 53 4

Eicher v. *United States*, 774 F.2d 27 5

First v. *Commissioner*, 547 F.2d 45 4

Franklet v. *United States*, 761 F.2d 529 4

Graves v. *Commissioner*, 579 F.2d 392, cert. denied, 440 U.S. 946 4

Jenney v. *United States*, 755 F.2d 1384 4

Kahn v. *United States*, 753 F.2d 1208 ..... 4, 5

Lull v. *Commissioner*, 602 F.2d 1166 cert. denied, 444 U.S. 1014 4

McDonald v. *Smith*, No. 84-476 (June 19, 1985) 5

Pell v. *Procunier*, 417 U.S. 817 5

Randall v. *Commissioner*, 733 F.2d 1565 4

United States v. *Lee*, 455 U.S. 252 4

Wall v. *United States*, 756 F.2d 52 4

Welch v. *United States*, 750 F.2d 1101 4

Page

Constitution and statutes:

U.S. Const. Amend. I 5, 6

Internal Revenue Code of 1954 (26 U.S.C.):

§ 6702 ..... 1, 3, 4, 5

§ 6702(a) 3

§ 6703 (c) 3

Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, § 326(a), 96 Stat. 617 3

Miscellaneous:

S. Rep. 97-494, 97th Cong., 2d Sess. (1982) 3, 4

In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-1676

ELIZABETH S. McKEE AND DEBORAH GIBBS,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that Section 6702 of the Internal Revenue Code cannot constitutionally be interpreted to authorize the imposition of a civil penalty for filing a federal income tax return that claims a "war tax" credit based on asserted conscientious opposition to defense spending. The decision below is correct. Petitioners do not allege, nor is there, a conflict among the circuits on the question presented. There is no basis for further review.

1. Each petitioner filed a 1983 federal income tax return (Form 1040) on which she claimed a credit based on her estimate of the share of her taxes that was allocable to defense spending. Petitioner McKee altered line 42, which reads "foreign tax credit," to read "foreign war tax credit," and claimed a credit thereon in the amount of $561.66. She then reduced her reported tax liability by that amount and

reported an overpayment of $2,009.03. She requested a refund of $1,447.37, which corresponded to the amount that would have been shown as an overpayment without the claimed war tax credit. She entered an amount equal to the claimed war tax credit on line 67, altering the words "Amount of line 65 to be applied to your 1984 estimated tax" appearing on that line to read "Amount of line 65 to be spent on social services." In a letter attached to her return, she explained that she was claiming the war tax credit based on her conscientious objection to defense spending and was requesting that the portion of her reported "overpayment" attributable to such credit be expended on social services. Pet. App. 3-4.

Petitioner Gibbs added the notation "CMTC ESCROW ACCT" to line 48 of her Form 1040, which reads "total credits," and entered on that line a credit in the amount of $248.80. That credit served to reduce her aggregate tax liability as reported on line 56 from $622 to $373.20. She claimed an overpayment of $399.83 on line 65 and requested a refund of that amount. In a letter attached to her return, she explained that, pursuant to her religious beliefs, she was requesting a refund of 40% of her tax liability, a figure that she believed to correspond to the percentage of the federal budget allocated to military expenditures. She stated in her letter that she intended to deposit the requested refund into the "Conscience and Military Tax Campaign Escrow Account for a World Peace Tax Fund." Pet. App. 4-5.

The Internal Revenue Service assessed a $500 civil penalty against each petitioner pursuant to Section 6702 of the Code.[1] After paying the requisite portion of the penalty

---

[1]Unless otherwise noted, all statutory references are to the Internal Revenue Code of 1954 (26 U.S.C.), as amended (the Code or I.R.C.).

($75) and filing a claim for refund (see I.R.C. § 6703(c)), petitioners brought these refund suits in the United States District Court for the Middle District of North Carolina. They contended that their 1983 tax returns did not fall within the scope of Section 6702 and that, in any event, the statute was unconstitutional as applied to them. The district court in each case rejected their contentions (Pet. App. 18-49) and the Fourth Circuit, after consolidating their appeals, unanimously affirmed (*id.* at 1-17).

2. Petitioners contend, somewhat half-heartedly (Pet. 11-16), that their conduct did not violate Section 6702. That section was added to the Code in 1982 (Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, § 326(a), 96 Stat. 617) as part of Congress's response to the "rapid growth in deliberate defiance of the tax laws by tax protestors." S. Rep. 97-494, 97th Cong., 2d Sess. 277 (1982). The statute provides for the immediate assessment of a $500 civil penalty on the filing of any return (or purported return) that fails to "contain information on which the substantial correctness of the self-assessment may be judged" or that "contains information that on its face indicates that the self-assessment is substantially incorrect," provided that such conduct is due to "a position which is frivolous" or to a "desire * * * to delay or impede the administration of Federal income tax laws" (I.R.C. § 6702(a)).

Petitioners' 1983 tax returns plainly satisfied the statutory conditions for imposing the penalty. As the court of appeals correctly held (Pet. App. 11), it is irrelevant under Section 6702 whether or not petitioner's conduct resulted in an actual loss of revenue to the government. Rather, the application of the statute turns on whether the self-assessment reflected on the return is substantially incorrect and, if so, whether the discrepancy is based on a legally frivolous position. There is no room for dispute here as to

either point. Both petitioners substantially understated their reported tax liabilities by claiming the benefit of patently improper "war tax" credits. There is no colorable basis in any provision of the Internal Revenue Code for avoiding any portion of one's tax liability on the basis of opposition, conscientious or otherwise, to military spending or to any other government spending program. The courts of appeals have repeatedly and uniformly rejected such claims. See, *e.g., Randall* v. *Commissioner*, 733 F.2d 1565 (11th Cir. 1984); *Lull* v. *Commissioner*, 602 F.2d 1166 (4th Cir. 1979), cert. denied, 444 U.S. 1014 (1980); *Graves* v. *Commissioner*, 579 F.2d 392 (6th Cir. 1978), cert. denied, 440 U.S. 946 (1979); *First* v. *Commissioner*, 547 F.2d 45 (7th Cir. 1976); *Autenrieth* v. *Cullen*, 418 F.2d 586 (9th Cir. 1969), cert. denied, 397 U.S. 1036 (1970). And this Court in *United States* v. *Lee*, 455 U.S. 252, 260 (1982), expressly rejected the notion that a taxpayer could avoid income taxes based on conscientious objection to military spending.

This line of decisions clearly demonstrates that petitioners' position in claiming "war tax" credits because of such objections is legally frivolous. In fact, the legislative history of Section 6702 specifically identifies as an example of the sort of conduct intended to be covered by the statute a return showing a reduced tax due because of a claimed "war tax" deduction. S. Rep. 97-494, *supra*, at 278; see Pet. App. 7. Accordingly, the courts have uniformly sustained the imposition of the Section 6702 penalty in such circumstances. See *Collett* v. *United States*, 781 F.2d 53 (6th Cir. 1985); *Franklet* v. *United States*, 761 F.2d 529 (9th Cir. 1985); *Wall* v. *United States*, 756 F.2d 52 (8th Cir. 1985); *Jenney* v. *United States*, 755 F.2d 1384 (9th Cir. 1985); *Kahn* v. *United States*, 753 F.2d 1208 (3d Cir. 1985); *Welch* v. *United States*, 750 F.2d 1101 (1st Cir. 1985). Petitioners do not allege a circuit conflict on the question.

3. Petitioners devote the bulk of their petition (Pet. 16-48) to an elaboration of their contention that Section 6702, as applied to them, violates their First Amendment right to petition Congress for redress of grievances. This position is only slightly less frivolous than that reflected on their 1983 tax returns. The penalties at issue were imposed, not for sending the IRS "a message protesting against military expenditures" (Pet. 16), but for filing Forms 1040 that set forth incorrect self-assessments based on "war tax" credits, credits that petitioners knew or should have known were wholly improper. It cannot seriously be disputed that " '[p]enalizing an individual who seeks to claim frivolous tax deductions in no way hinders that individual from complaining to any government official about the way those taxes are spent.' " *Kahn* v. *United States*, 753 F.2d at 1223 n.8 (brackets in original), citation omitted). See also *Pell* v. *Procunier*, 417 U.S. 817, 828 n.6 (1974) (limiting a prison inmate's access to the press does not burden his First Amendment right to petition when alternative means of communication are available); *Eicher* v. *United States*, 774 F.2d 27, 29-30 (1st Cir. 1985).

Petitioners' argument on this point amounts to an extended critique of this Court's decision in *McDonald* v. *Smith*, No. 84-476 (June 19, 1985), which unanimously rejected without dissent the argument that the First Amendment confers absolute immunity from libel actions that are based on allegedly libelous communications with government officials. Petitioners' contentions obviously provide no grounds for this Court to reconsider that decision. In any event, petitioners' arguments are irrelevant to the issue here because the penalties were imposed not for the act of petitioning for a redress of grievances but for the act of filing an improper tax return. Petitioners are free to write to any government official to protest the government's spending policies. They are not permitted, however, to claim spurious deductions or credits on their federal income tax returns,

thereby burdening the administration of the tax laws. Such conduct is properly subject to civil penalties; it is entitled to no more protection under the First Amendment than the filing of baseless litigation. See *Bill Johnson's Restaurants, Inc.* v. *NLRB*, 461 U.S. 731, 743 (1983).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

MAY 1986